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No. _____

In The

Supreme Court of the United States

October Term, 1991

JACQUELYN HUNTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eight Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under this Court's prior decisions holding that evidence of the totality of the circumstances in which sexually explicit materials were disseminated is relevant to all three prongs of the *Miller* test for obscenity, did the courts below err:

1) in holding that defendants in an obscenity prosecution had no right to inform the jury of all the circumstances in which the allegedly obscene materials were disseminated; and

2) by instructing the jury to disregard evidence of the discreet and insulated nature of the mailing to willing adult recipients?

LIST OF PARTIES

Petitioner Jacquelyn Hunter and her co-defendant Robert Easley, Jr. brought separate appeals which were consolidated in the Eighth Circuit decision upholding their convictions. Robert Easley is not a party to this petition and is therefore a respondent along with the United States.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as *United States v. Easley*, 927 F.2d 1442 (8th Cir. 1991), and is reproduced as Appendix A to this Petition. The Court of Appeals' unreported order denying rehearing appears as Appendix C. The district court's unreported judgment and sentencing order are reproduced as Appendix B.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its opinion in this case on March 21, 1991,

and denied Petitioner's motion for rehearing on May 13, 1991. Petitioner has filed this petition within 90 days of that date. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment I

"Congress shall make no law . . . abridging the freedom of speech, or of the press."

UNITED STATES CODE

18 U.S.C. § 2

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

18 U.S.C. § 1461

"Every obscene . . . article, matter, thing, device or substance . . . is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section . . . to be nonmailable . . . shall be fined . . . or imprisoned . . . or both."

STATEMENT OF THE CASE

Petitioner Jacquelyn Hunter was formerly employed in a management capacity by Diverse Industries, Inc., a now-defunct California corporation and a mail-order distributor of erotic videotapes and magazines. Although the trial court found that Petitioner Hunter "did not play a leadership role [in the company] at the time of the offense" (App. 33), she was indicted and later convicted on four counts of mailing obscene materials in violation of 18 U.S.C. § 1461 and § 2. These charges were based on shipments Diverse made in response to orders placed by a postal inspector in Minnesota, in late 1987 and early 1988.

At trial, the defendants offered evidence that they had followed practices carefully designed to limit their distribution of erotic materials to informed and willing adults, e.g., their established practice of mailing advertising materials inside a second, inner envelope cautioning that sexually-oriented materials were enclosed. The trial court granted the government's motion to exclude any such evidence, on the erroneous theory that it was only relevant to establish an impermissible "consenting adult defense." Despite the defendants' arguments that this evidence was critically relevant to establish a factual context in which the jury could evaluate whether the materials violated community standards of prurience and patent offensiveness, the district court excluded all such evidence of the surrounding circumstances.

Furthermore, the trial court again rejected the defendants' arguments that the totality of the circumstances is vitally relevant, when it instructed the jurors that they *must disregard* any such evidence for the defense:

> "[I]t is not a defense to the crimes charged in the indictment that defendants may have sold these materials to adults who willingly purchased them, *and it should not in any way be a part of your deliberation in this case.*" (Instruction Number 28; emphasis added.)

The jury returned a guilty verdict, and the trial court sentenced Petitioner to serve four months in a federal prison. On appeal, the Eighth Circuit affirmed both the trial court's evidentiary ruling and the jury instruction, essentially because "such context evidence has only been accepted as a sort of *aggravating* factor in the obscenity determination, and not as a *mitigating* factor." (App. 7; emphasis added.) The Court of Appeals denied Petitioner's motion for rehearing on May 13, 1991. (App. 37.)

REASONS FOR GRANTING THE WRIT

EVIDENCE OF THE MANNER AND CIRCUMSTANCES IN WHICH THE DEFENDANT DISSEMINATED ALLEGEDLY OBSCENE MATERIALS IS CRUCIALLY RELEVANT IN DETERMINING WHETHER THOSE MATERIALS ARE OBSCENE UNDER THE *MILLER* TEST, AND THE COURT OF APPEALS' DECISION TO THE CONTRARY MERITS THIS COURT'S REVIEW AND REVERSAL.

The trial court excluded the defendants' evidence of the totality of the circumstances in which the alleged

disseminations took place, i.e. that they routinely took precautions to disseminate their erotic wares only to consenting adults, and to avoid inadvertent exposures to unwilling recipients. Although the defense proffered this evidence expressly to negate the element of patent offensiveness, and *not* as grounds for a dismissal or complete defense, the trial court erroneously concluded that it impermissibly raised a "consenting adults defense."[1] The court also instructed the jury to disregard such evidence entirely, for the same reason.

The Court of Appeals acknowledged that the trial court had thus misconstrued the issue, and that in fact the defendants had proffered this evidence to disprove patent offensiveness. The Eighth Circuit, however, fashioned an even broader and more grievously unconstitutional rule, one patently at odds with this Court's treatment of the issue: that evidence of the circumstances

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[1] In granting the government's motion in limine and in its instruction to the jury, the trial court accepted the government's theory that the defendants' contextual evidence should be excluded under *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973): "We categorically disapprove the theory . . . that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only." Neither Petitioner nor her co-defendants had contended that they were entitled to an absolute affirmative defense or dismissal on that ground; they argued rather that the proferred evidence was critical to the jury's evaluation of whether the materials in question violated the community's standards, as the Court of Appeals recognized. (App. 5.)

surrounding the dissemination of erotic materials is relevant only when the government offers it to prove obscenity, and not when the defense offers it to *disprove* obscenity.

This rule is as illogical and as contrary to this Court's pronouncements as it is prejudicial and fundamentally unfair. It would require jurors to evaluate community standards of patent offensiveness and prurient appeal in a vacuum, devoid of the totality of facts which must inform any meaningful consideration of a community's degree of tolerance or acceptance of the materials. For example, in the Cincinnati Contemporary Art Center's recent obscenity trial for exhibiting the photographs of Robert Mapplethorpe, the Eighth Circuit's rule would disallow evidence that the defendants had presented the controversial photographs in a museum setting to adult patrons who wished to survey the work of a great photographer. A jury would certainly deem such contextual evidence highly relevant and would likely find materials presented in a museum exhibition, or marketed exclusively to informed and willing adults, much less "patently offensive" to the community than, for example, the same depictions splashed on a billboard in full view of an elementary school, or broadcast on network television.

Under this Court's decisions recognizing the relevance of such evidence in obscenity cases, the Eighth Circuit erred in affirming the exclusion of defendants' evidence and the challenged jury instruction. In obscenity cases both pre- and post-*Miller v. California*, 413 U.S. 15 (1973), this Court has repeatedly stated that context is

relevant in determining the obscenity *vel non* of expressive materials, and has never suggested that the defense may not present such evidence. This Court in *Miller*, 413 U.S. at 18, 32, stressed the context in which "sexually explicit materials ha[d] been thrust by aggressive sales action upon unwilling recipients," and emphasized that the obscenity of particular materials was geographically variable. The *Miller* Court also cited numerous of its prior decisions recognizing that the same materials might be found obscene if distributed in one context although non-obscene if limited to consenting adults. *See, e.g., Ginsberg v. New York*, 390 U.S. 629, 637-643 (1968) (materials might be "obscene for minors" yet not for adults); *Ginzburg v. United States*, 383 U.S. 463, 470 (1966) (materials otherwise non-obscene might be found more offensive if the mode of dissemination "would tend to force public confrontation with the[ir] potentially offensive aspects . . . to those who are offended by such material"). *See also Pinkus v. United States*, 436 U.S. 293 (1978). Thus in *Miller*, and consistently in its other decisions, this Court has held that whether a work is legally obscene depends not merely on the material itself in the abstract, but also upon the totality of the circumstances surrounding its dissemination. (See Argument A., *infra.*)

The decision below is sharply at odds with this principle. The Court of Appeals would allow only the government's evidence of a "pandering" context, while depriving the defense of the ability to present evidence of "non-pandering" or otherwise mitigating circumstances. This rule dramatically and unfairly tips the balance in favor of the government in obscenity trials, a matter of considerable practical importance given the current

onslaught of federal obscenity prosecutions. (See Argument C.)

Moreover, such a rule serves none of the public policy rationales this Court has accepted in justification of criminal obscenity laws. In another of the decisions which define modern obscenity law, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Court undertook to explain why criminal obscenity laws are warranted, in the face of four dissents that no suitable justification existed for criminalizing erotica disseminated to consenting adults. For the majority, Chief Justice Burger advanced only one empirically-based justification for anti-obscenity laws: that government has an interest in protecting "the total community environment, the tone of commerce in the great city centers." 413 U.S. at 58.

In cases such as this one, however, a rule excluding evidence that the defendants took care to avoid exposure to anyone other than the willing adult customer does not at all serve this objective. This Court implicitly recognized as much in *Stanley v. Georgia*, 394 U.S. 557 (1969), concluding that the private consumption of erotica involved no state interests sufficient to overcome the First Amendment values at stake.[2] "[T]o assert . . . that unmarked brown envelopes speeding through the mails

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[2] As the Court concluded in *Stanley*, 394 U.S. at 565:

> "If the First Amendment means anything, it means that [the government] has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

to Mr. Stanley's protected home impinge on the 'total community' environment is surely to claim too much," as Professor Tribe has observed.[3]

The Court has continued to recognize that, as opposed to the narrower societal interests in protecting children and unwilling adults from inappropriate exposure to erotica, or their involvement in its production, consenting adult consumption of erotica does not give rise to any compelling governmental interest. Very recently, this Court has reaffirmed this principle, characterizing the governmental interests in denying adults access to erotica as "weak" and "paternalistic," in contrast to the compelling interest in protecting minors from involvement in child pornography. *Osborne v. Ohio*, ___ U.S. ___, 110 S.Ct. 1691, 1696-1697 and n. 4 (1990).

For these reasons, both because evidence of the circumstances of dissemination is inherently relevant and because the societal interests at stake in cases of private adult acquisition of erotica become attenuated to the vanishing point, this Court's decisions recognizing that such evidence is relevant to the obscenity question should apply equally to the defendants' proffered evidence. At the very least, the patent offensiveness to the community is mitigated, as the Massachusetts courts have noted in holding that exclusion of an obscenity defendant's contextual evidence constitutes reversible error. *See Commonwealth v. Plank*, 378 Mass. 465, 392 N.E.2d 841 (1979), and its progeny (discussed *infra*, Argument B.), creating a rule

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[3] Tribe, *American Constitutional Law* 917 (1988).

with which the Eighth Circuit's decision below stands in direct conflict.

Because the Eighth Circuit has decided this important question of federal law in a manner which conflicts both with the rule announced by a state court of last resort, and more importantly with prior decisions of this Court, the decision below warrants this Court's review.

A. The Court of Appeals' Decision That Mitigating Contextual Evidence Is Irrelevant Directly Conflicts With This Court's Prior Decisions In *Ginzburg v. United States* and *Hamling v. United States*.

Evidence of the manner and circumstances in which an obscenity defendant disseminated erotic materials is critically relevant in determining whether those materials are patently offensive, whether they appeal to a prurient interest, and whether serious artistic or other values are involved, as this Court has consistently recognized, most explicitly in the post-*Miller* era in *Hamling v. United States*, 418 U.S. 87, 130 (1974). The Court of Appeals therefore fundamentally misinterpreted this Court's prior decisions as allowing a court to exclude such evidence from an obscenity jury's deliberation.

On the same day this Court clarified the *Roth* doctrine in *Memoirs v. Massachusetts*,[4] it held in *Ginzburg v.*

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[4] *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1966).

United States, 383 U.S. 463, 470-471 (1966), that evidence of "pandering," i.e. evidence that "the purveyor's sole emphasis is on the sexually provocative aspects of his publication," could be "decisive" in determining obscenity under the *Roth/Memoirs* test. The Court reasoned that such evidence was relevant because a "pandering" context *"would tend to force public confrontation* with the potentially offensive aspects of the work; *the brazenness of the appeal heightens the offensiveness of the publications* to those who are offended by such material." 383 U.S. at 470 (emphasis added). Likewise, "the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was . . . pretense or reality." *Id.*

By the same token, evidence of a non-"pandering" context, for example the circumstances in which the Cincinnati Contemporary Arts Center presented the Mapplethorpe retrospective to a consenting adult audience in its gallery, could be decisive in disproving obscenity. A jury would be much less likely to find the photographs exhibited in that context patently offensive, or prurient in their appeal, than the same photographs presented in isolation from Mapplethorpe's other work, perhaps in a magazine sold in an adult bookstore and solely emphasizing "the leer of the sensualist." The jury would also be much more likely to find that the Mapplethorpe photographs offered serious artistic or other value in the context of an art gallery exhibition stressing those values. The rule adopted by the Eighth Circuit would, however, withhold such vital evidence from the jury's consideration.

If "forcing public confrontation" with the material heightens the offensiveness of erotic works, as the Court concluded in *Ginzburg* and reaffirmed in *Hamling*, then evidence that obscenity defendants limited distribution of their materials to informed, willing adults, sought to minimize their "brazenness," and avoided "public confrontation" certainly *lessens* their materials' offensiveness. In this case, defendant Diverse Industries followed a number of practices designed to avoid offending community standards. The company had a policy of refusing to ship erotic videotapes into areas where they perceived community standards to be hostile to such erotica. (App. 25.) It also adhered to practices of mailing materials only to adults who requested them, and of enclosing those materials in a second, inner envelope advising the recipient of their sexually explicit nature. (App. 4.) Yet the trial court instructed the jury that it must disregard such probative evidence on grounds that the defendants were not entitled to a "consenting adults defense" – a defense which they had in fact not sought to invoke. The Court of Appeals held even more broadly that obscenity defendants may be precluded from presenting evidence of the attendant circumstances under *any* theory. Such a rule is overwhelmingly prejudicial because it permits the jury to speculate wildly, free to imagine a much more offensive scenario involving dissemination to minors or unconsenting adults, regardless of the actual facts.

The government has been quick to capitalize on the circumstances in which erotica is distributed when the context tends to aggravate offensiveness or prurient appeal. This Court has held that it may do so. In *Hamling*,

418 U.S. at 130, the Court approved the following instruction given at the government's behest:

> "In making this [obscenity] determination, you are not limited to the materials themselves. In addition, you may consider the setting in which they were presented. Examples of what you may consider are such things as: **Manner of distribution, circumstances of production, sale, and advertising . . . . Such evidence is pertinent to all three elements of the basic test of obscenity.**"[5]

In the post-*Miller* era, therefore, the rule under this Court's decisions has been that the jury may be instructed to consider the circumstances in which allegedly obscene materials were disseminated, because it "is common sense that the mode and manner in which the [material is] presented to the general public . . . may be considered" in determining obscenity under the *Miller* standard. *United States v. Dost*, 575 F.2d 1301, 1305 (10th Cir. 1978).

In *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court again reaffirmed the essential relevance of context in determining whether materials are patently offensive. In *Pacifica*, the Court upheld the FCC order proscribing the broadcast of George Carlin's "Filthy Words" monologue under 18 U.S.C. § 1464, which prohibited "indecent" radio communications. The Court agreed with the Commission that "indecent" was analogous to "patently offensive" under the obscenity test,[6] and

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[5] *See United States v. Hamling*, 481 F.2d 307, 322 (9th Cir. 1973) (emphasis added).

[6] The Court in *Pacifica* noted that the "patently offensive" issue closely related to a determination of the second prong of

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stressed that the context of an afternoon broadcast when children would presumably be listening was critical to that determination of patent offensiveness: "As the Commission itself emphasized, its order was 'issued in a specific factual context' . . . it cannot be adequately judged in the abstract." 438 U.S. at 742. The Court quoted Justice Holmes' "classic exposition of the proposition that both the content and the context of speech are critical elements of First Amendment analysis":

> " '[T]he character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. . . . The question in every case is whether the words are used in such circumstances and are of such a nature that they will bring about the substantive evils that Congress has a right to prevent.' " *Id.* at 744-745, quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919).

Thus the Court emphasized that a determination of offensiveness must be considered in context: "Words that are commonplace in one setting are shocking in another." 438 U.S. at 747.

If the jury is to consider circumstances of dissemination which involve "pandering," exposure to minors, or otherwise "forcing public confrontation with the work," and thus favor the prosecution, then obscenity

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the *Miller* test: "These words offend for the same reasons that obscenity offends." 438 U.S. at 746.

defendants are certainly entitled to present evidence of circumstances in which they carefully avoided such public confrontation and sought to conform to community standards. This Court has never suggested otherwise. Unless this Court's decisions are to be irrationally construed to mean that sauce for the goose is not sauce for the gander, the Court of Appeals has fundamentally erred in holding that contextual evidence is admissible only "as a sort of aggravating factor in the obscenity determination, and not as a mitigating factor." (App. 7.)

B. The Court of Appeals' Decision Also Conflicts With The Massachusetts Supreme Judicial Court's Resolution of This Issue.

In addition to diverging from the prior decisions of this Court, the Court of Appeals' rule regarding evidence of context in obscenity trials directly conflicts with the decision of a state court of last resort. In *Commonwealth v. Plank*, 378 Mass. 465, 392 N.E.2d 841 (1979), the Massachusetts Supreme Judicial Court held evidence of a consenting-adults-only context (precisely such evidence as the trial court excluded in this case) to be essential in the determination of "patent offensiveness" under *Miller*.

In *Plank*, the Massachusetts Court reversed the obscenity conviction of a nude dancer, holding that *in the context* of the dancer's performance before consenting adult patrons, the evidence was legally insufficient to establish that the dancing was "patently offensive." The court reasoned that such evidence of a willing adult

audience was centrally relevant in determining "patent offensiveness" under prevailing community standards:

> "[T]he issue of patent offensiveness is to be decided in context. So far as appears, the dance took place on stage in a 'club' before willing adult patrons. . . . We do not think the additional evidence that the dancer touched herself in places mentioned by the statute was sufficient to warrant a finding that an average citizen of Massachusetts today would be repelled." 378 Mass. at 469-470, 392 N.E.2d at 844.

Following *Plank*, the Massachusetts courts have consistently enforced this rule that the "patent offensiveness" element must be determined "in context," and that it is reversible error to exclude such evidence. In *Commonwealth v. Dane Entertainment Services, Inc.*, 19 Mass. App. 573, 476 N.E.2d 250 (1985), the court reversed a movie theater operator's conviction for possession of an allegedly obscene motion picture, because the trial court had rejected the defendant's requested jury instruction to this effect:

> "The issue of patent offensiveness should be decided in context. The jury should consider not only the films themselves, but also the circumstances under which they are to be disseminated. These circumstances include the nature and location of the business offering the films, notice to prospective patrons, and precautions, if any, to ensure that unwilling patrons will not be exposed to such films unwillingly." 19 Mass. App. at 575-576 n.3, 476 N.E.2d at 252 n. 3.

Noting the evidence that the theater in question was relatively nondescript, featuring an inoffensive sign describing its fare as "Triple X-Rated" and advising the

public that only adults would be admitted, the court concluded:

> "The jurors were required to distinguish between what is obscene material and what is constitutionally protected speech based upon such abstract concepts as patent offensiveness, and we cannot say that had the jury been properly instructed, the result might not have been different." 19 Mass. App. at 578, 476 N.E.2d at 250.

Thus the Court of Appeals decision below directly contravenes the Massachusetts rule requiring that defendants in obscenity cases be allowed to introduce contextual evidence, and that the jury be properly instructed to consider it, based on the Supreme Judicial Court's interpretation of the federal Constitution and this Court's decisions. This doctrinal conflict between two jurisdictions underscores the importance of this Court's resolving the federal question and reaffirming its earlier holdings regarding the relevance of context in obscenity determinations.

C. The Court Of Appeals' Decision Has Fundamentally And Prejudicially Distorted The *Miller* Equation, Creating Error Which Will Critically Affect Numerous Pending Federal Obscenity Trials, And Which Therefore Calls For Resolution By This Court.

The question presented by this case is far from academic – it has immediate practical importance in the numerous federal obscenity cases which are pending or

imminent in virtually every federal circuit.[7] Having obtained this extremely and unfairly favorable decision that the defense can be precluded from introducing contextual evidence which tends to negate obscenity, the government will undoubtedly seek to obtain similar rulings in all its other pending obscenity prosecutions. This erroneous decision will of course bind district courts in the Eighth Circuit; as the only express holding on this point, it will be deemed weighty authority in other circuits as well. Inevitably, this highly prejudicial rule, by depriving the jury of the whole truth, will result in obscenity convictions obtained in a vacuum, where a jury given the full factual context might otherwise have found the materials within its community's standards, and thus protected by the First Amendment.

It is, moreover, a rule which serves no valid purpose for which the criminal obscenity laws may exist; it merely tips the scales in favor of convictions and against free expression among willing adult speakers and audiences. In the current climate of extreme government hostility to sexually oriented speech, those scales have already been tipped too far, and Petitioner respectfully asks this Court to restore the balance the First Amendment requires.

The decision below contravenes the very essence of the *Miller* approach. To tinker with the obscenity equation

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[7] To the knowledge of undersigned counsel, the federal government is currently pursuing obscenity prosecutions against nearly forty California adult video companies in district courts in at least the Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits.

in this way is to penalize disseminators of erotica who have carefully endeavored to limit distribution of their materials to those adults who wish to receive them, and to invite error in countless pending cases.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully urges this Court to grant a writ of certiorari and to reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-5074MN

United States of America, *
*
Appellee, *
* Appeals from the
v. * United States District
* Court for the District of
Robert Joe Garcia Easley, Jr., * Minnesota.
Appellant. *

No. 90-5075MN

United States of America, *
*
Appellee, *
*
v. *
*
Jacquelyn L. Hunter, *
Appellant. *

Submitted: November 15, 1990

Filed: March 21, 1991

Before ARNOLD and MAGILL, Circuit Judges, and BENSON,* Senior District Judge.

MAGILL, Circuit Judge.

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*The HONORABLE PAUL BENSON, Senior United States District Judge for the District of North Dakota, sitting by designation.

Robert Easley, Jr., and Jacquelyn Hunter appeal their convictions for mailing obscene materials in violation of 18 U.S.C. §§ 2, 1461 (1988). On appeal they challenge the district court's[1] obscenity instructions, the facial validity of 18 U.S.C. § 1461, and the government's prosecutions in general. We affirm.

I.

The appellants, Robert Easley, Jr., and Jacquelyn Hunter, were, respectively, the owner and manager of Diverse Industries, Inc., a California corporation. Diverse Industries was a mail order purveyor of sexually explicit videocassettes and magazines.[2] Postal Inspector William Morris, responding to advertisements mailed by Diverse Industries, ordered various movies and magazines on four different occasions. Inspector Morris used a fake name and a post office box return address when ordering the items. Diverse Industries mailed the materials to Inspector Morris in Minnesota.

Based on the material in these four mailings, a grand jury indicted Hunter and Easley on four counts of violating 18 U.S.C. §§ 2, 1461.[3] Specifically, they were indicted

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[1] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

[2] The current status of Diverse Industries is somewhat unclear from the record. At some time before trial, Easley sold the company to Hunter. Hunter now claims that Diverse is out of business.

[3] 18 U.S.C. § 2(a) states: "Whoever commits an offense against the United States or aids, abets, counsels, commands,

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for aiding and abetting the mailing of nonmailable material on November 13, 1987; November 19, 1987; December 1, 1987; and March 18, 1988. The jury found Hunter and Easley guilty on all counts. Easley was sentenced to four concurrent twelve-month terms of imprisonment, three years of supervised release, a $30,200 fine, and 300 hours of community service. Hunter was sentenced to four concurrent four-month terms of imprisonment, two years of supervised release, a $200 special assessment, and 300 hours of community service.

II.

Easley and Hunter raise numerous issues in their consolidated appeals. For simplicity's sake, these issues are divided into three categories: challenges to the jury instructions on obscenity; a challenge to the facial validity of 18 U.S.C. § 1461; and challenges to the government's prosecutions in general.

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induces or procures its commission, is punishable as a principal."

Section 1461 states, in pertinent part: "Every obscene . . . article, matter, thing, device or substance . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section . . . to be nonmailable . . . shall be fined . . . or imprisoned . . . or both. . . . "

A. Jury Instructions

To address Easley's and Hunter's challenges to the jury instructions, it is necessary to first review briefly the analysis the factfinder uses to determine whether sexually explicit material is obscene: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the average person, applying contemporary community standards, would find that the work depicts or describes, in a patently offensive way, specified sexual conduct; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24, 30 (1973). Easley and Hunter argue that several of the district court's jury instructions concerning this analysis are erroneous.

1. Consenting Adults

Hunter first argues that the district court erred in excluding evidence that the materials were intended only for consenting adults and by instructing the jury to disregard any evidence to that effect. At trial, Hunter tried to present evidence that Diverse Industries' mailed advertisement, which Inspector Morris used to place his orders, was enclosed within a second, inner envelope that informed the recipient that sexually oriented material was inside. The government sought to exclude the evidence on the ground that it related to a "consenting adult defense," which the Supreme Court has expressly prohibited. *See Paris Adult Theater I v. Slaton*, 413 U.S. 49, 57

(1973) ("We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only."). Hunter argues that the district court erred in accepting this argument because the evidence was not offered to establish the consenting adult defense, but to show that the ordered materials were not patently offensive.

Hunter argues that the envelope with the warning is relevant to patent offensiveness because the context in which sexually explicit material is presented may affect a juror's view of the offensiveness of the material. For example, Hunter argues, a person might find a sexually explicit billboard offensive, but might not find offensive the same scene in a movie viewed at home. Part of the context in this case, Hunter contends, is that the mailed materials were sent only to adults who wanted them.

Hunter makes the same argument with respect to the district court's instruction: "[I]t is not a defense to the crimes charged in the indictment that defendants may have sold these materials to adults who willingly purchased them, *and it should not in any way be a part of your deliberation in this case*" (emphasis added). Hunter contests the emphasized portion of the instruction, arguing that the district court, "by instructing the jury that it could not consider the fact of an [sic] consenting-adults-only audience . . . allowed the jury to evaluate the 'patent offensiveness' question under a presumption of child or unwilling adult recipients." Appellant Hunter's Brief at 10.

The gist of Hunter's argument is that although the fact that sexually explicit materials were distributed to consenting adults is not a complete defense to an obscenity prosecution, it is a factor in determining whether the materials are patently offensive. The logical implication of this novel argument is that the district court erred in not allowing the jury to consider the circumstances of the materials' distribution.

In making this argument, Hunter relies principally on *Hamling v. United States*, 418 U.S. 87 (1974), and *Ginzburg v. United States*, 383 U.S. 463 (1966). *Ginzburg* involved the prosecution of a corporation and its owner for violating 18 U.S.C. § 1461. The Supreme Court explicitly noted that to determine obscenity, normally only the allegedly obscene publications were necessary. 383 U.S. at 465. In *Ginzburg*, however, the government had "charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene." *Id.* In response to the government's charge, the Court stated: "We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity . . . . " *Id.* at 465-66. The Court later stated: "We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material . . . . " *Id.* at 474.

In *Hamling*, the Supreme Court approved an instruction that informed the jurors that if they found the

obscenity determination to be close, they could also consider "whether the materials had been pandered, by looking to their '[m]anner of distribution, circumstances of production, sale, . . . [and] advertising.' " 418 U.S. at 130.

For a number of reasons, these cases do not support Hunter's argument that the district court erred by not allowing the jury to consider evidence that only consenting adults received the material. First, the Court has approved the use of evidence of "context" only when the government has alleged pandering. In this case, the government made no such claim. Furthermore, such context evidence has only been accepted as a sort of aggravating factor in the obscenity determination, and not as a mitigating factor, as Hunter asks us to hold. Second, even when approving the use of such evidence, the Court has stated only that it "may" or "could" be considered, not that it must be. Therefore, the fact that such evidence was not allowed is not a ground for reversal unless the district court abused its discretion. On the record before us, no such abuse exists. Finally, the Court has approved the use of such evidence only in "close" cases. Hunter does not argue that the obscenity determinations in this case were close[4] and we refuse to speculate on the issue. Therefore, the district court did not err in its instruction or in refusing to admit the evidence.

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[4] Hunter does note that the jury found one magazine and one video not obscene.

2. Accept or Tolerate

Hunter next argues that the trial court erroneously instructed the jury that patent offensiveness is to be measured by what the adult community will accept, rather than tolerate. The district court's instruction to the jury on patent offensiveness stated:

> The second prong to be applied in determining whether material is obscene, is whether it depicts or describes sexual conduct in a patently offensive way. Examples of sexual conduct would include ultimate sexual acts, normal or perverted, actual or simulated; masturbation; excretory functions or lewd exhibition of the genitals. In making this judgment, you must measure whether the material is patently offensive by contemporary community standards; that is, whether it so exceeds the limits of what the adult community will *accept* as to be patently offensive.

Instruction 35 (emphasis added).

Hunter argues that the Supreme Court's decisions in *Smith v. California*, 361 U.S. 147 (1959), and *Smith v. United States*, 431 U.S. 291 (1977), require that patent offensiveness be measured by what the adult community will tolerate, not what it will accept. In *Smith v. California*, Justice Harlan stated: "[T]he Fourteenth Amendment does not permit a conviction . . . unless the work complained of is found substantially to exceed the limits of candor set by contemporary community standards. The community cannot . . . condemn that which it generally tolerates." 361 U.S. at 171 (Harlan, J., concurring in part and dissenting in part; footnotes omitted). This statement, however, is not part of the majority opinion and is

mere dictum within Justice Harlan's separate opinion. In *Smith v. United States*, the Court observed that "contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community." 431 U.S. at 305. The problem with Hunter's reliance on *Smith v. United States* is that that opinion involved a jury instruction stating that "contemporary community standards were set by what is in fact *accepted* in the community as a whole," *id.* at 297-98 (emphasis added); this instruction was never challenged and the Court never addressed it. It seems likely that the Court in *Smith v. United States* viewed "tolerate" and "accept" as synonymous, and thus Hunter cannot rely on this case for the proposition that the district court erred in refusing to use "tolerate" instead of "accept." *See also New York v. Ferber*, 458 U.S. 747, 761 n.12 (1982) (using "accept" and "toleration" in the same footnote); *Miller*, 413 U.S. at 32 ("It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.").

Other circuits have similarly rejected the argument that "tolerate" must be used in the definition of patent offensiveness. *See United States v. Pryba*, 900 F.2d 748, 759 (4th Cir.) ("To take the word 'tolerance' out of one sentence in *Smith* and insist that it be used as the test for contemporary community standards misreads the opinion."), *cert. denied*, 111 S. Ct. 305 (1990); *Hoover v. Byrd*, 801 F.2d 740, 742 (5th Cir. 1986) (rejecting the argument that "community standards of toleration" was the only

constitutionally correct formulation of the patent offensiveness definition); *United States v. Battista*, 646 F.2d 237, 245-46 (6th Cir.) (characterizing the argument as "misplaced"), *cert. denied sub nom. Peraino v. United States*, 454 U.S. 1046 (1981); *see also United States v. Petrov*, 747 F.2d 824, 831 (2d Cir. 1984) ("A key issue in any obscenity case is the degree of community acceptance or tolerance of materials similar to those at issue."), *cert. denied*, 471 U.S. 1025 (1985).

Hunter's argument is without any relevant case support.[5] Therefore, the district court's instruction was not erroneous.

3. Lasciviousness

Hunter argues that the district court erred in using the word "lascivious" to define "prurient interest." The district court's instruction to the jury on prurient interest states, in pertinent part: "An appeal to the prurient interest is an appeal to the unhealthy, abnormal, *lascivious*, shameful, or morbid interest in sex as distinguished from a normal and healthy interest in sex." Instruction 33 (emphasis added).

Hunter relies on *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), for the proposition that using "lasciviousness" to define prurient interest was erroneous. In

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[5] Hunter also relies on two state court cases, *State ex rel. Collins v. Superior Court*, 787 P.2d 1042 (Ariz. 1986), and *Leach v. American Booksellers Ass'n. Inc.*, 582 S.W.2d 738 (Tenn. 1978), that are neither persuasive nor binding on this court.

Brockett, the Supreme Court reversed a lower court's ruling that struck a state obscenity statute for overbreadth. The state statute at issue defined "prurient" as "that which incites lasciviousness or lust." *Id.* at 494. The Ninth Circuit struck the entire obscenity statute for overbreadth, believing that "lust" also reached material that stimulated normal sexual responses and thus was constitutionally protected. *Id.* at 495. The Supreme Court reversed the circuit court's invalidation of the statute, believing that its overbreadth could be cured by excising the word lust: "[I]t is equally certain that if the statute at issue here is invalidated only insofar as the word 'lust' is taken to include normal interest in sex, the statute would pass constitutional muster." *Id.* at 504-05.

Hunter argues that just as "lust" has lost most of its negative connotation, so has "lascivious," and that they refer primarily to "mere arousal of normal sexual interests." Hunter relies on dictionary definitions of "lascivious" to illustrate that word's applicability to normal sexual desires. We believe, however, that *Brockett* has foreclosed this question. The Supreme Court expressly stated in that case that lasciviousness was an appropriate definition of prurient interest: "Furthermore, had the Court of Appeals thought that 'lust' refers *only* to normal sexual appetites, it could have excised the word from the statute entirely, since the statutory definition of prurience referred to 'lasciviousness' as well as 'lust.' " *Id.* at 505 (emphasis in original); *see also Vernon Beigay, Inc. v. Traxler*, 790 F.2d 1088, 1094 (4th Cir. 1986) (stating that the Supreme Court has recognized "lewd" and "lascivious" as proper definitions of prurient interest). We do not believe that in the six years since *Brockett* was decided,

the meaning of lascivious has changed such that it now describes primarily normal sexual interests. Therefore, the district court's instruction was proper.

4. Normal and Healthy Interest in Sex

Hunter also challenges Instruction 33 for requiring the jury to determine whether the materials appealed to the prurient interest rather than a "normal *and* healthy" interest in sex. Hunter argues that the government's burden to prove appeal to prurient interest was lessened because to be found non-obscene, the materials had to appeal to both a normal *and* a healthy interest in sex. Hunter contends that *Brockett* requires that the material appeal only to a normal interest in sex, not a normal and healthy interest. This argument is without merit. *Brockett* clearly states that non-obscene material provokes "only normal, healthy sexual desires." 472 U.S. at 498. The district court's instruction is consistent with this language.

5. Appeal to Average Adult Person

Easley challenges another of the district court's instructions on prurient interest. The district court instructed the jury: "If the predominant appeal of the materials in question here, taken as a whole, is an appeal to the normal interest in sex of the average adult person, the jury must acquit the accused." Instruction 34. Easley argues that the district court erred in rejecting his proposed jury instruction:

> In determining whether the material involved in this case appeals to a prurient interest in sex, you must judge this material with reference to its appeal, or lack thereof, to the average adult person in Minnesota.
>
> If you believe that the government has failed to prove beyond a reasonable doubt that the charged materials appeal to the shameful or morbid interest in sex of the average adult person in the state of Minnesota, you must find the Defendants not guilty.

At trial, Easley objected to Instruction 34 because it did not state that to convict the defendants, the jury had to find that the material appealed to the prurient interest of the average adult person. The district court believed that Instruction 34 combined with Instruction 33 satisfied Easley's concerns. Instruction 33 states, in relevant part: "In the first part of the test to determine whether material is obscene, you must decide whether the average adult person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest."

Easley argued at trial and now argues on appeal that this court's decision in *United States v. Treatman*, 524 F.2d 320 (8th Cir. 1975), requires that the court instruct the jury that it must evaluate the material with respect to its prurient appeal to the average adult member of the community. In *Treatman*, this court held erroneous a district court's supplemental instruction concerning prurient interest. The main instruction in that case stated that the material "must be measured by its appeal to the average American adult." *Id.* at 322. After the jury asked the judge

whether the material must appeal to the majority of average adults or merely to some of the average adults, the judge informed them that there was no requirement that the material appeal to the majority of the average adults in the community. *Id.* This court observed that the jury clearly "did not understand that the prurient interest of the average adult must be measured by the synthesis of the entire community." *Id.* at 323. We held that the district court's supplemental instruction was erroneous because it implied that the material only need appeal to "some" of the average people. *Id.*

We hold that the district court in this case did not err in rejecting Easley's proffered instruction. The only functional difference between Easley's proposed instruction and Instructions 33 and 34 is that Instruction 33 does not end " . . . appeals to the prurient interest *of the average adult person in Minnesota.*" It would be redundant for a court to instruct the jury that to satisfy the first part of the obscenity test it must determine whether the average person, applying contemporary community standards, would find that the material appeals to the prurient interest of the average person. In making the prurient interest finding, the jury is essentially stepping into the shoes of the average person. *Treatman* merely stands for the proposition that when stepping into these shoes, the jury steps into the shoes of a "composite or synthesis of the community," not "the majority, or a few, or some." 524 F.2d at 323. Instructions 33 and 34 clearly show that the jury was to view the material in the light of the average person. The court explained this average person in Instruction 31, which states: "In deciding whether the material as a whole appeals to the prurient interest . . . the jury must

evaluate what judgment would be made by a hypothetical average person applying the collective view of the adult community." Therefore, the district court did not err in rejecting Easley's proffered instruction.

6. Lack of Community Standards

Easley next argues that the district court erred in rejecting his proposed jury instruction that if the jury could not determine the community standards for the state, the defendants must be acquitted. At trial, Easley objected to Instruction 32, which states:

> Contemporary community standards are set by what is in fact accepted in the community as a whole; that is to say, by the adult society at large or adult people in general; and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept. It is a matter of common knowledge that customs change and that the community as a whole may find acceptable at one time, that which was formerly unacceptable. The community as a whole may also find presently acceptable that which some particular group of the population may regard as unacceptable.
>
> In determining contemporary community standards, the jury may consider what, as shown by the evidence in the case, appears in contemporary magazines, books, newspapers, television, motion pictures, novels and other media of communication which are freely available in the community as a whole.

> The "community" you must consider in deciding these questions is the District of Minnesota – in other words, the entire State of Minnesota. You must decide how the average adult person would apply the contemporary adult community standards existing within the state.

Easley argues that because the jury might possibly have been unable to determine the contemporary community standards, he was entitled to the following clarifying instruction: "If you feel you are unable to determine the community standards of the District of Minnesota, and that the Government has failed to offer proof beyond a reasonable doubt of the relevant community standards, then you must find the Defendants not guilty."

Easley proffers no relevant case support for the proposition that a jury must be instructed that if it cannot determine the community standards, it must acquit the defendants.[6] He cites *United States v. Various Articles of Obscene Merchandise*, 709 F.2d 132, 135 (2d Cir. 1983), and *United States v. 2,200 Paper Back Books*, 565 F.2d 566 (9th Cir. 1977), for the proposition that if a community standard cannot be determined, then the defendant must be acquitted. That proposition is true insofar as it applies to those cases, but does not help Easley here. In both of the cases, the trier of fact was the district court judge. In *2,200 Paper Back Books*, the circuit court noted: "While ordinarily we anticipate that a jury or judge is in a

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[6] Easley again relies primarily on two state court cases, *State v. Kam*, 726 P.2d 263 (Haw. 1986), and *Commonwealth v. Trainor*, 374 N.E.2d 1216 (Mass. 1978), that are neither binding on this court nor persuasive in their reasoning.

position to determine the community standard even without testimony on that issue, we are presented here with the unique circumstance where a judge was unable to do so." 565 F.2d at 571 n.8. The judge in *2,200 Paper Back Books* informed the government of his inability to determine community standards, which made it incumbent on the government to provide evidence of the standards. *Id.* The Ninth Circuit held that the government failed to do so and thus did not meet its burden of proof. *Id.*

The Second Circuit in *Various Articles* explained that to "arrive at a measure of community tolerance of pornographic material the trial judge may rely on his own experience in the community and decide as best he can what most people seem to think about such materials." 709 F.2d at 136. The court continued, "If, on the other hand, he has little or no knowledge of their views, he may turn to opinion proof, and if the government fails to offer such proof, he may be relegated to finding that it has failed to sustain its burden." *Id.*

Neither of these cases support Easley's proposition that a court must instruct the jury that if it cannot determine community standards, the jury must acquit the defendant. Therefore, the district court did not err in rejecting an instruction to which Easley was not entitled. Moreover, there is no evidence in the record before us showing that the jury in this case had any problem determining the community standards. It seems unlikely that such a case would ever arise. As the Supreme Court observed in *Hamling*: "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw

on his knowledge of the propensities of a 'reasonable' person in other areas of the law." 418 U.S. at 104-05. Easley and Hunter both called expert witnesses on the issue of community standards, and their counsel discussed it at length in closing arguments. The jury instead relied on its own knowledge of community standards, which it was entitled to do, to find the materials obscene.

B. Challenges to 18 U.S.C. § 1461

Hunter next challenges the statute under which she was convicted, 18 U.S.C. § 1461. *See supra* n.3. Hunter contends that the statute is facially invalid because it is overbroad and impermissibly chills speech. To succeed on her overbreadth claim, Hunter must show that § 1461 reaches constitutional conduct. *See Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). Because the Supreme Court has expressly held that obscene material is not constitutionally protected, *see, e.g., Miller*, 413 U.S. at 23, and because the statute only applies to obscene material, Hunter's overbreadth challenge fails.

Hunter also argues that the unpredictability of prosecution under § 1461, its vague definition of obscenity, its weak scienter requirement, and its harsh penalties all create an impermissible regime of self-censorship. These arguments are utterly without legal merit and are better addressed to Congress because the Supreme Court has already rejected them. *See Hamling*, 418 U.S. at 123; *Roth v. United States*, 354 U.S. 476, 491-92 (1957).

C. The Prosecutions

Hunter and Easley both challenge their prosecutions and convictions in more general terms as well. Most of their specific claims arise from the circumstances of their prosecutions. Hunter and Easley allege, and the government does not dispute, that their prosecutions resulted from the government's "Project PostPorn." This law enforcement technique features "a series of multidistrict indictments against distributors of sexually oriented materials." *PHE, Inc. v. United States Dep't of Justice*, 743 F. Supp. 15, 19-20 (D.D.C. 1990). The project is "a cooperative effort between the Department of Justice and the Postal Inspection Service and constitute[s] the first nationwide effort to identify and prosecute violators of federal laws prohibiting the use of the mails to advertise and distribute obscene materials." *Id.* Hunter and Easley were indicted first in Bellevue, Washington, then in Duluth, Minnesota, and finally in Louisville, Kentucky. They moved to dismiss the indictments in Duluth on various grounds. The district court rejected their motions and they now argue that this was error.

1. Double Jeopardy

Hunter and Easley first argue that the district court erred in refusing to dismiss their indictments because the successive prosecutions violated the double jeopardy clause of the fifth amendment, which provides that no person shall "be subject for the same offense to be twice put in jeopardy." U.S. Const. amend. V.

Hunter and Easley argue that because they were indicted in Washington for aiding and abetting the mailing of obscene material before they were indicted in Minnesota for the same crime, the Minnesota indictments should have been dismissed. They argue that because their underlying conduct, namely, their involvement with Diverse Industries, was the same in both prosecutions, the double jeopardy clause bars the Minnesota prosecutions.

The Supreme Court's recent decision in *Grady v. Corbin*, 110 S. Ct. 2084 (1990), controls our analysis of this claim. The Supreme Court in *Grady* stated that the first step in a double jeopardy analysis is to determine whether *Blockburger v. United States*, 284 U.S. 299 (1932), disposes of the claim. Under *Blockburger*, the double jeopardy clause bars "successive prosecutions for the same criminal act or transaction under two criminal statutes whenever each statute does not 'requir[e] proof of a fact which the other does not.' " *Grady*, 110 S. Ct. at 2087 (quoting *Blockburger*, 284 U.S. at 304). The *Grady* Court stated: "If application of that test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred." *Id.* at 2090.

Blockburger does not bar the successive prosecutions of Hunter and Easley. As the Fifth Circuit concluded in *United States v. Linetsky*, 533 F.2d 192 (5th Cir. 1976), on essentially the same facts present in the case before us:

> While the counts at issue in the [successive] indictments are rooted in the same statutory provisions, charge the same substantive violation, and involve mailings of the same allegedly

> obscene material, factual identity is lacking with respect to the overt acts. The similar counts in the two indictments involve not only different addresses but also different mailings which are temporally and geographically distinct.

Id. at 197; *accord United States v. Toushin*, 714 F. Supp. 1452, 1459-60 (M.D. Tenn. 1989) (following *Linetsky*).

Under *Grady*, the second step in a double jeopardy analysis goes beyond *Blockburger*:

> Thus, a subsequent prosecution must do more than merely survive the *Blockburger* test. As we suggested in [*Illinois v. Vitale*, 447 U.S. 410 (1980)], the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. . . . The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. . . . On the other hand, a State cannot avoid the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct.

Id. at 2093 (footnote omitted).

Hunter and Easley argue that *Grady*'s focus on previously charged conduct that becomes constitutionally off-limits in subsequent prosecutions points up the district court's error here. The Minnesota indictments offend the double jeopardy clause, their argument runs, because

their conduct in supervising Diverse Industries was essentially the same for both the Washington and Minnesota indictments. The appellants' argument stumbles, however, on the facts of their crimes. These two indictments charge the same kind of conduct; they do not charge the same conduct. The Washington bill charged Hunter and Easley with using, or aiding the use of, the mail to distribute obscene material in October 1987. The Minnesota indictment charged them with committing the same crime on four different occasions: twice in November 1987, once in December 1987, and once in March 1988. In both cases, the appellants' aid came from managing Diverse Industries. In each case, however, that aid – their crime for purposes of 18 U.S.C. §§ 2, 1461 – came at different times. That difference in time makes Hunter's and Easley's conduct legally different. The Minnesota indictment, therefore, did not require the government to "prove conduct that constitutes an offense for which the defendant[s] ha[ve] already been prosecuted." *Grady*, 110 S. Ct. at 2093. Because the appellants were not prosecuted in Kentucky until after the Minnesota prosecutions were completed, those proceedings are not relevant to this appeal. The constitutional effect, if any, of the Washington and Minnesota prosecutions on the later Kentucky prosecutions is not before us. We accordingly express no opinion on that point.

Because the Minnesota prosecutions of Hunter and Easley required the proof of facts not present in the Washington prosecutions and because the Minnesota prosecutions did not involve conduct for which they had

already been prosecuted, the double jeopardy clause does not bar the successive prosecutions.[7]

2. First Amendment

Hunter also argues that the district court erred in not dismissing her indictment because the government's successive prosecutions violate her first amendment rights. She argues in general that "Project PostPorn" will result in "chok[ing] off the mailing of all constitutionally protected erotica" because of the vagueness of the *Miller* analysis. Hunter's argument essentially asks this court to overrule *Miller*. This is a challenge we are unable, as well as unwilling, to accept.

3. Harassment

Finally, Hunter and Easley argue that the district court should have dismissed the indictments because the government's successive prosecutions constituted harassment in violation of the fifth amendment. They rely primarily on *PHE, Inc. v. United States Dep't of Justice*, 743 F. Supp. 15 (D.D.C. 1990). In *PHE*, the government, after

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[7] Easley also argues that the Minnesota indictment should have been dismissed because the government fragmented a single conspiracy into multiple conspiracies in violation of the double jeopardy clause. This argument is without merit. The government charged Easley and Hunter with conspiracy only in the Kentucky indictment. All other charges were for the substantive offense of aiding and abetting in the mailing of obscene matter.

searching the distributor's premises, threatened to prosecute the distributor in multiple federal jurisdictions unless it agreed to curtail its business and stop distributing sexually explicit materials, including materials the government knew were not obscene. The government repeatedly made this threat, and engaged in other conduct as well, leading the distributor to seek an injunction against the government. *Id.* at 18-20. On these facts, the district court found harassment and granted PHE a preliminary injunction prohibiting the Justice Department from returning indictments against the distributor in more than one federal district. *Id.* at 25-27.

The case before us is clearly distinguishable from *PHE*. Here, the government did not repeatedly threaten Hunter and Easley with multiple prosecutions. Neither did the government attempt to suppress Diverse Industries' distribution of materials the government knew were not obscene. The harassment found in *PHE* is simply not present in the case before us.

Hunter and Easley, in essence, argue that they were unconstitutionally harassed because the government ordered their materials and then prosecuted them in multiple jurisdictions. This argument fails because the use of postal inspectors to order sexually explicit material is not improper, *see Smith v. United States*, 431 U.S. 291 (1977), and 18 U.S.C. § 1461 clearly makes *each* mailing of obscene material a crime.

The fundamental problem with Hunter's and Easley's harassment claims is that they seek to place the

responsibility for their current predicaments on an intolerant, crafty government. The true locus of the responsibility, however, is squarely on their own shoulders. Hunter and Easley knew they were distributing sexually explicit material. They also knew those materials were subject to the community standards of ninety-three different federal districts. They even maintained a list of areas where they thought their material would be considered obscene. Unfortunately for them, Minnesota was not on that list. As Hunter admits, due to this "error in perception," Diverse is out of business. Appellant Hunter's Brief at 5. This same error in perception also resulted in their prosecutions and subsequent convictions. Hunter and Easley thus have no one to blame but themselves.

III.

For the foregoing reasons, Hunter's and Easley's convictions for violating 18 U.S.C. §§ 2, 1461 are affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

United States District Court

District of Minnesota

UNITED STATES OF AMERICA V. Jacquelyn L. Hunter	JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT Case Number Criminal 5-88-23 (2)
(Name of Defendant)	H. Louis Sirkin Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____ .

[X] was found guilty on count(s) 1, 2, 3 and 4 after a plea of not guilty.

Accordingly the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 USC 2 and 1461	Distribution of obscene material	1 thru 4

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) ___, and is discharged as to such count(s).

[ ] Count(s) ___ (is)(are) dismissed on the motion of the United States.

[ ] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[X] It is ordered that the defendant shall pay to the United States a special assessment of $ 200.00 , which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

383-50-3453

January 30, 1990
Date of Imposition of Sentence

Defendant's mailing address:

23046 Mulberry Glen

Valencia, CA 91354

/s/ Paul A. Magnuson
Signature of Judicial Officer

Paul A. Magnuson, Judge
Name & Title of Judicial Officer

Defendant's residence address:

Same as above

February 12, 1990
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of four (4) months.

[X] The Court makes the following recommendations to the Bureau of Prisons:

that the defendant's time be served in a community correctional facility. Confinement to be as close to defendant's home as practicle [sic]. Work release recommended.

No fine or restitution.

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district,

[ ] at ____ a.m. p.m. on _____ .

[ ] as notified by the Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[X] before 2 p.m. on Monday, March 5, 1990.

[X] as notified by the United States Marshal.

[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this Judgment.

CERTIFIED ORIGINAL AND TRUE COPY IN 4 PAGES

DATED: February 12, 1990 _____
United States Marshal

By: /s/ illegible
Deputy Clerk

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of two (2) years.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Serve first four months in a community correctional facility.

Defendant to contribute 300 hours of community service at the direction of the probation office.

Work release recommended.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

United States of America,
Plaintiff,

CR. File No. 5-88-023(02)

v.

Jacquelyn L. Hunter,
Defendant.

FILED
FEB 14 1990

STATEMENT OF REASONS FOR IMPOSING SENTENCE

I. Findings of Fact

There being no objections to the factual statements contained in the presentence investigation report (PSI), the court adopts those statements as its findings of fact.

II. Purposes

Defendant Jacquelyn L. Hunter is not a violent offender and does not pose a danger to society. Therefore, incapacitation is not an important concern. The main purpose behind sentencing Hunter is deterrence. Both Hunter and other purveyors of obscene material must be aware that society will not tolerate transmission of this variety of pure, unmitigated smut through the mails. Hunter's sentence of incarceration, supervised release and community service also ensures that she will receive the amount of punishment sufficient, but not greater than necessary, to reflect the seriousness of the offense and to provide just punishment for its commission.

III. Application of the Guidelines

The defendant and the government raise three issues relating to the guideline calculations contained in the PSI. First, Hunter contends that the court should not enhance her offense level based on the pecuniary gain derived from the offense. Hunter asserts that a five-level increase pursuant to § 2G3.1(b)(1) is not "sufficiently reasonable" when applied to the facts of the case. *See United States v. Lee*, 887 F.2d 888 (8th Cir. 1989). The government responds that an offense-level increase is warranted for pecuniary gain and that a seven-level increase is appropriate.

The base offense level for mailing of obscene matter is six. Guideline § 2G3.1(b)(1) instructs that "[i]f the offense involved an act related to distribution for pecuniary gain, [the court should] increase by the number of levels from the table in § 2F1.1 corresponding to the retail

value of the material, but in no event by less than 5 levels." The Sentencing Commission's Background Commentary to § 2G3.1 leaves no doubt about the applicability of the increase for pecuniary gain. It states, "Most federal prosecutions for offenses covered in this guideline are directed to offenses involving distribution for pecuniary gain. Consequently, the offense level under this section generally will be at least 11." Hunter does not claim that she was involved in transmitting obscene material in the mail for eleemosynary reasons. Therefore, the plain language of § 2G3.1(B)(1) requires an increase for pecuniary gain. The only issue is the amount of the increase. At the sentencing hearing the government introduced evidence of the number of copies of "Loose Ends," one of the items found obscene by the jury, that Diverse Industries, Inc. (Diverse) had purchased from distributors. However, the government failed to prove the number of copies sold by the company. Without reliable information relating to the specific amount of gain received, the court cannot use the table in § 2F1.1. Consequently, only a five-level increase is warranted.

Second, the government requests an upward adjustment for Hunter's role in the offense, while the defendant suggests that her role was minimal. At trial the court heard conflicting testimony from employees of Diverse. Some testified that Hunter had a significant supervisory role, while others testified that she was little more than a bookkeeper. Hunter was in a management position at Diverse, but she did not play a leadership role at the time of the offense. She was a salaried employee, and she did not control policy decisions at the company. In addition,

Hunter did not own stock, in the company at the time of the offense.

The court is satisfied that Hunter was neither a leader or organizer nor a minor participant in this offense. She is the sort of average offender contemplated by the guidelines for which no adjustment for role in the offense is necessary. Thus no offense level enhancement for aggravating role under guideline § 3B1.1, or reduction for mitigating role pursuant to § 3B1.2, is warranted.

Finally, Hunter asks that she be given credit for acceptance of responsibility. The court is aware of the difficulties associated with acceptance of responsibility in the context of multiple prosecutions for similar offenses. In order to accommodate Hunter, the court postponed sentencing for several weeks until the other prosecutions concluded. At no time has Hunter "clearly demonstrate[d] a recognition and affirmative acceptance of personal responsibility" for her criminal conduct. Guideline § 3E1.1(a). Indeed, Hunter now owns and operates Diverse, having bought the company from her codefendant Robert Easley. Hunter is not entitled to a two-level reduction.

Having made these findings, the [court] determines that the applicable guidelines are:

Total Offense Level:	11
Criminal History Score:	0 – Category I
Applicable Guideline Range:	8-12 months

IV. Sentence

On each count of conviction defendant is committed to the custody of the Bureau of Prisons to be imprisoned for a period of four months. Each term of imprisonment is to be served concurrently. The court strongly recommends that this period of incarceration be served in a community correctional facility as near as possible to defendant's home in California. It is further recommended that work release shall apply during this period of incarceration. Upon release from imprisonment defendant shall be placed on supervised release for a period of two years. The first four months of supervised release shall be served under the condition of community confinement. Again, work release shall apply during this period of confinement. Defendant also shall provide 300 hours of community service at the direction of the probation office. These conditions of supervised release are also to be served concurrently on each count. Finally, defendant shall pay a special assessment of $50 per count, for a total of $200.

The court imposes sentence within the range applicable to this defendant and for this offense because the facts found are of the kind contemplated by the guidelines and because a sentence within the range is sufficient, but not greater than necessary, to satisfy the purposes of sentencing relevant to this defendant. This "split sentence" is imposed under the authority of guideline § 5C1.1(d). No aggravating or mitigating circumstances exist that were not adequately considered by the Sentencing Commission.

The court recognizes that the defendant is indigent. Therefore, because of the defendant's inability to pay, the court does not order the defendant to pay a fine, costs of imprisonment or costs of supervision.

Dated: February 12, 1990.

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-5075MN

United States of America, Appellee,	*	Order Denying Petition for Rehearing with Suggestion for Rehearing En Banc
v.	*	
Jacquelyn L. Hunter, Appellant.	*	FILED MAY 13 1991

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

May 13, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gins
Clerk, U. S. Court of Appeals, Eighth Circuit